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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

GORDIE M. HERREN ..... *Petitioner,*

v. No. .....

FARM SECURITY ADMINISTRATION, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA ..... *Respondent.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

Decision, District Court, W. D. Arkansas, El Dorado Division, May 12, 1945, *Herren* v. *Farm Security Administration, Department of Agriculture,* Civil No. 263, 60 Fed. Sup. 694. Decision, Circuit Court of Appeals, Eighth Circuit, January 10, 1946, No. 13123, *Herren* v. *Farm Security Administration, Department of Agriculture, United States of America,* 153 Fed. 2d 76. Findings of fact and conclusion of law in United States District Court, W. D. Arkansas, El Dorado District, October 14, 1946 (R. 39-46). Opinion, United States Circuit Court of Appeals, Eighth Circuit, No. 13518, *Farm Security Administration, Department of Agriculture, United States of America* v. *Gordie M. Herren,* January 12, 1948 (R. 378-400).

JURISDICTION

Jurisdiction is based on 28 U. S. C. A., Sec. 41 (20); Jud. Code, Sec. 24 (20) (Tucker Act), and, 28 U. S. C. A. 347; Jud. Code Sec. 240 amended (*Certiorari* to Circuit Court of Appeals).

STATUTES INVOLVED

Emergency Relief Appropriation Act of 1935 (49 Stat. 115). Sec. 2252-61, Pope's Digest, Statutes of Arkansas (benevolent corporations). See Appendix III.

Watts v. *Commercial Printing Co.*, 177 Ark. 527; 7 S. W. (2d) 24; holds approval of Court essential to effect corporation, *de jure*.

EXECUTIVE ORDERS

The President issued a number of Executive Orders creating and putting in operation Resettlement Administration and transferring its functions to Secretary of Agriculture. See Appendix I.

CONGRESSIONAL HEARINGS—FARM SECURITY ADMINISTRATION

Pamphlet, 88829, Government Printing Office, 1944, Hearings before the Select Committee on Agriculture, to Investigate the Activities of the Farm Security Administration, 78th Congress, First Session, H. Res. 119, March 18, 1943, Part 3. For an excerpt, see Appendix II. (Copies are not available to be supplied by petitioner for the convenience of the Court.)

QUESTIONS PRESENTED

1. Whether, under the Tucker Act, the United States may be sued for waste committed in breach of a lease of lands taken over and farmed by Farm Security Administration in discharge of its governmental function to administer relief in stricken agricultural areas; and, which lease, the trial Court found from the facts in evidence was actually a contract and agreement between Farm Security Administration and the owner of the land.

2. Whether the Secretary of Agriculture, in the discharge of a governmental function under Executive Orders pursuant to an Act of Congress, can insulate the United States against liability under the Tucker Act for waste committed from the poor husbandry of the Farm Security Administration by its use of an administrative procedure or a method of keeping records in accounting for the expenditure of public funds for rural relief.

3. Whether the decision of the Eighth Circuit Court of Appeals in *Herren* v. *Farm Security Administration, Department of Agriculture, United States of America,* rendered January 10, 1946, 153 Fed. 2d 76, conflicts with and is contradictory to the decision of the same Court rendered January 12, 1948, in *Farm Security Administration, Department of Agriculture, United States of America* v. *Gordie M. Herren.* (R. 378-400).

4. Whether the Circuit Court of Appeals may ignore the findings of a District Court, sitting as a Court of Claims, unless such findings are without warrant of law, and, reverse a judgment awarding damages under the Tucker Act. *United States* v. *Esnault-Pelterine,* 303 U. S. 26; *Fritch* v. *United States,* 248 U. S. 458; *Brothers* v. *United States,* 250 U. S. 88; *Lee Hardware Co.* v. *United States* (8 CCA) 25 Fed. (2d) 42.

5. Whether the United States, functioning through Farm Security Administration, is liable under the Tucker Act ~~was~~ waste committed on leased premises when the evidence establishes Farm Security Administration was the actual lessee though its agency device is named lessee in the written agreement; and, if not, is the United States liable as the actual lessee under a contract implied as a fact. *Ford* v. *Williams,* 62 U. S. 287; *Bostwick* v. *United States,* 94 U. S. 53, 68; *Keifer and Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381; *United States* v. *North American Transp. and Trading Co.,* 253 U. S. 330; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *United States* v. *Lynah,* 188 U. S. 445; *United States* v. *Cress,* 243 U. S. 316.

STATEMENT

THE COMPLAINT: Petitioner brought this action under the Tucker Act against the United States asking damages for $10,000 for waste committed by Farm Security Administration in breach of its lease of her farm of 700 acres. It was alleged while the written agreement of lease named Ashley Homestead Association, Inc., a benevolent corporation, as the lessee, "that said benevolent association was set up, created and at all times directed, managed and controlled by the agents and employees of Farm Security" (R. 6). That Ashley Homestead was merely a device conceived by Farm Security for its enterprise and activity in securing possession of plaintiff's land for its own use and purposes, and in truth and in fact, Farm Security Administration was the lessee and Gordie M. Herren the lessor, and the two being the real contracting parties" (R. 7); "That Farm Security Administration has had complete charge and direction of, and has operated, said farm during the lease period through its own creature and agent, and it is solely responsible for the present depleted, deteriorated and damaged condition of said lands" (R. 8); "That in its direction, supervision, control, operation and management of said leased lands, the Farm Security Administration, itself and through its device, has violated and breached the terms of said lease (R. 8); "That as a result of the negligent husbandry and failure of proper supervision, direction, operation and management on the part of Farm Security Administration, it will be impossible for the plaintiff to farm or lease said premises for farming for the year, 1945" (R. 8-9).

DECISIONS: To the complaint the United States filed a Motion to Dismiss and for summary judgment. On May 12, 1945, the District Court dismissed on the ground the Farm Security Administration, created as a relief agency, is an executive agency and not a governmental corporation, and consent to be sued can not be implied so that District Court is without jurisdiction of action against the United States arising out of alleged breach of lease by the Administration. *Herren* v. *Farm Security Administration, et al.*, 60 Fed. Sup. 694. The Eighth Circuit Court of Appeals reversed the judgment of dismissal and remanded the case for trial holding an action for damages for breach of cove-

nant against waste contained in farm lease authorized to be made by Farm Security Administration was maintainable against the United States in District Court under the Tucker Act. *Herren* v. *Farm Security Administration, et al.*, 153 Fed. 2d 76; in its opinion the Circuit Court of Appeals said, "Whether the Ashley Homestead Association, Inc., as a corporation had any real interest in the lease, or whether it was a mere agent of the Farm Security Administration in making the lease so that the use of its name was in effect simply a contractual designation for the Farm Security Administration in the instrument, and whether, if such was the case, the Farm Security Administration had authority to make or adopt a contract of lease in that manner and form on behalf of the United States, are questions which on the record and briefs now before us we must leave to the determination of the trial court on the remand of the case. Other questions also perhaps may be involved, and all of these of course will be left open, except that, *if the Farm Security Administration was in fact the real lessee of the land,* and if the use of the name Ashley Homestead Association, Inc., was in effect simply a contractual designation for the Farm Security Administration in making the lease, and if the Farm Security Administration had authority *to make* or *adopt a contract of lease in that manner and form,* then the United States may properly be held liable on the contract under the Tucker Act for any waste the Farm Security Administration may have committed in violation of the lease covenant."

EVIDENCE: In the fall of 1939, Petitioner, Mrs. Gordie M. Herren, a widow, agreed to lease for five years her 700-acre farm in Ashley County, Arkansas, to Farm Security Administration (R. 100). (Hereafter, Petitioner will be called, Mrs. Herren, and, Farm Security Administration, F. S. A.)

EVIDENCE: Preliminary negotiations and agreements were made between Mrs. Herren's son, as her agent, and the State (Arkansas) Director of F. S. A. Annual rentals were $2,500 less certain deductions for payments in advance and annual repairs. F. S. A. Engineers were to specify, and did specify, required repairs to improvements (R. 94, 99-100). After Mrs. Herren agreed to lease, she sold all her livestock and equipment (R. 104) and from the proceeds

spent $1,500 plus for repairs required by F. S. A. (R. 83). See Exhibit to lease (R. 20-25). Mrs. Herren and her son leased to F. S. A. (R. 81, 107-110). The mere "paper existence" of Ashley Homestead, and, the actual operation of Mrs. Herren's farm ~~is~~ are made clear by the evidence of F. S. A. tenants. F. S. A. officials, agents and employees actually controlled, conducted and operated the farm and dealt with tenants as landlord (R. 117, 154).

EVIDENCE: On January 11, 1940, Mrs. Herren, without reading it, signed the written lease, Exhibit A to Complaint, (R. 10, 27) in the office of F. S. A. in Little Rock, Arkansas (R. 80). F. S. A. was represented by Crawford, State Co-operative Specialist. On the same day in the same city, Southwest Joint Stock Land Bank, mortgagee of the farm, signed the agreement (R. 82). Mrs. Herren received her copies of the lease through the mails on June 30, 1940, from F. S. A. (R. 82).

EVIDENCE: The written lease and option to purchase, dated January 1, 1940, named Mrs. Herren and South West Joint Stock Land Bank, called, lessors, Ashley Homestead Association, Inc., called lessee, and the United States, acting by and through the Secretary of Agriculture, called, Government (R. 19, 186-187). The acknowledgments reflected Mrs. Herren's was taken in *Ashley* County, South West Joint Stock Land Bank's in *Pulaski* County and Ashley Homestead in *Drew* County, before three different notaries, all on the same day, January 11, 1940 (R. 19-20). T. Roy Reid, Regional Director, Farm Security Administration, by telegram dated December 14, 1939, signed, M. L. Wilson, acting Secretary of Agriculture, was authorized to, and did, sign the lease for the United States (R. 186-187). After the Congressional investigation of F. S. A. activities, F. S. A. stopped its administrative practice of leasing in this form (R. 288-290).

EVIDENCE: The lease contained the usual terms, specified the option of the government to purchase and in Sec. 6(a) states: "The lessee agrees it will at all times farm the property in accordance with the requirements of good husbandry and will at the termination of this lease deliver possession of said property in the same condition as it now is, customary use and wear excepted (R. 14-15).

EVIDENCE: That prior to leasing, 565 acres of the farm were in an excellent state of cultivation. There were seven miles of open drainage ditches essential to that type of land. Improvements were in good condition (R. 7). The amount of damage is not questioned.

TRIAL COURT'S FINDINGS: After the case had been reversed and remanded for trial under the law as declared by the Eighth Circuit Court of Appeals in its opinion of January 10, 1946, 153 Fed. 2d 76, the Hon. John E. Miller, District Judge, El Dorado Division, Western District of Arkansas, at the conclusion of the presentation of the testimony on June 27, 1946, prior to filing his written findings after studying briefs, announced findings of fact on the questions propounded by the Circuit Court of Appeals except the amount of the waste committed by the Farm Security Administration. He stated there was no doubt at all that Ashley Homestead Association, Inc., was in truth and in fact the Farm Security Administration and the farm was damaged by reason of the occupancy of the F. S. A. and the government is liable for its damage (R. 364-65).

TRIAL COURT'S WRITTEN FINDINGS OF FACT: After considering extensive briefs, three and one-half months later on October 14, 1946, the Trial Court filed his written findings of fact (R. 41-46), to-wit:

2. To implement its program for the relief of distressed farmers, F. S. A. organized Ashley Homestead Association, a benevolent co-operative association, and leased farm lands *in its name* (R. 41).

3. On January 11, 1940, in F. S. A. office in Little Rock, Arkansas, Mrs. Herren signed a lease by the terms of which she leased her farm to the Ashley Homestead Association, Inc. Henry A. Wallace, Secretary of Agriculture, by T. Roy Reid, Regional Director, Region VI, Farm Security Administration, United States Department of Agriculture, signed the lease for the United States pursuant to a telegram of December 14, 1939, T. Roy Reid had received from the acting Secretary of Agriculture, reading: "You are hereby authorized to approve on behalf of the government the lease between the Ashley Homestead Association and the landlord. . . ." (R. 41).

4. All negotiations preceding the execution of the said lease were between Mrs. Herren or her agent and the officials of the Farm Security Administration. At no stage of the discussions, extending over a period of several months, did she contact any official of the Ashley Homestead, Inc., nor was the Association mentioned during the negotiations. No officer of the Association was present when the lease was signed by the plaintiff. Mrs. Herren thought she was leasing her farm to the Farm Security Administration and looked to that agency for the agreed rental and for compliance with the terms of the lease (R. 41-42).

5. Prior to the execution of the lease, the farm was inspected by a Farm Security Administration Engineer. A list of required repairs tenant houses and barns was submitted to the plaintiff by the Farm Security Administration which sent an agent to inspect the work before the lease was signed (R. 42).

6. After taking possession of the property, the operation and management of the farm was entirely under the control of the Farm Security Administration. Certain tenants who were not members of the Ashley Homestead, Inc., remained on the land and leased their tracts from the Farm Security Administration. Other tenants became members of the Association, the nominal lessee of the farm, by paying a $1 membership fee which was paid to a Farm Security Administration agent. These tenants farmed the land under close supervision of Farm Security Administration agents. Their tracts were parceled out to them, and they were told what to plant and where to plant it by Farm Security Administration agents. Their annual rent was paid to Farm Security Administration officials, and receipts were given by the latter. Their annual settlements were made with Farm Security Administration agents. In none of these transactions did the officials of the Ashley Homestead, Inc., participate. A Farm Security Administration supervisor, called a "rider," was in immediate charge of operations, and made daily trips around the farm to inspect activities (R. 42).

7. The affairs of the Association were entirely managed and controlled by the Farm Security Administration.

Notices of meetings of the Association were prepared and mailed from the County Farm Security Administration office in Hamburg, Arkansas. Minutes of the meetings also were prepared there and brought to the so-called officers of the Association for signature. Any action in the name of the Association was at the direction of Farm Security Administration agents, and the officers of the Association were mere figureheads who had no voice in its affairs. The so-called officers of the Association were mostly semi-literate and illiterate negro tenants. The Association had no authority to make any expenditures without the countersignature of a Farm Security Administration official. All rent checks received by the plaintiff were issued by the Farm Security Administration. For several years the Farm Security Administration had one of its agents on the Board of Directors of the Association (R. 42-43).

8. By the terms of the lease the plaintiff was required "to place said property in good repair and tenantable condition prior to January 1, 1940." Attached to the lease was a schedule of improvements required by the Farm Security Administration which included among other things, repairs on 17 houses and nine barns, and construction of three new barns. These items were completed and the farm was in good shape when the Farm Security Administration took possession (R. 43).

9. The lease was for a term of five years, beginning January 1, 1940, and ending December 31, 1944. It provided that the lessee "will at all times farm the property in accordance with the requirements of good husbandry and will at the termination of this lease deliver possession of said property in the same condition as it now is, customary use and wear excepted." In addition the lessor was required to expend $250 per year for repairs as required by the lessee. This $250 was deducted from the annual rent check for the years 1943 and 1944 (R. 43).

10. During the term of the lease the property was damaged, and such damage was caused solely by the failure of the Farm Security Administration to "farm the property in accordance with the requirements of good husbandry." As a result of poor husbandry, the property had been

damaged on the date of termination of the lease in the amount as follows:

Damage to 17 houses by acts of tenants	$2,000
Damage to 15 barns by acts of tenants	1,000
Damage to ditches by failing to keep repaired	700
Damage to fences by destroying them and failing to repair	300
Damage to land by poor cultivation and failure to cultivate	5,500
	$9,500

(R.44).

11. None of the foregoing damage was the result of unavailability of farm laborers. Any labor shortage on this farm was the direct result of poor husbandry of the agents of the Farm Security Administration which forced life-long tenants on the farm to leave their homes and seek other locations where they could farm in such manner as to make a living (R. 44).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court below erred:

1. In rejecting the findings of the District Court, established by the evidence, Farm Security Administration was the lessee in fact of the leased farm and solely responsible for the waste committed.

2. In rejecting the statement of the Trial Court, established by the evidence, at the conclusion of the introduction of the evidence (R. 364-366) declaring "I don't think there is any doubt at all, and I find as a matter of fact that the Ashley Homestead Association, Inc., was in truth and in fact the Farm Security Administration . . ."

3. In declaring "it is not clear that all Executive Orders and Hearings before Congressional Committees called to our Notice" were before the Trial Court, and, "the findings of fact filed in the Trial Court with the judgment do not attempt to reflect the gist or substance of the whole evidence received on the trial. . . ."

4. In declaring there was no evidence "that the Secretary of Agriculture ever authorized the creation of land-

leasing corporations by government officials or by Farm Security.

5. In declaring Ashley Homestead Association was a corporate entity, separate and distinct from Farm Security, and, "Ashley was a *bona fide* co-operative Association . . ."

6. In declaring the Trial Court did not relate his findings that Farm Security officers, managed, took possession of, operated and controlled the Herren Farm and Ashley Homestead to the proven program of operation and purpose of Farm Security.

7. In declaring there was no evidence the Supervision of Ashley Homestead was not entirely in accord with the government's interest in the loans made and in the success of its rural rehabilitation program and that the relationship was solely that of creditor-debtor.

8. In declaring there was nothing in the record to support a finding there was a meeting of minds between Farm Security or the United States that the United States would pay what Ashley agreed to pay.

9. That tne mere naming of Ashley Homestead as the lessee in the written lease precluded the Trial Court from finding as a fact, as the evidence established, Farm Security was the actual Lessee, and, Mrs. Herren was bound by the written terms as to the real contracting party.

10. In holding no employee of Farm Security Regional Office VI was authorized to lease Mrs. Herren's farm, when, the facts show the lease was executed pursuant to the telegraphic authority from the Secretary of Agriculture.

11. In holding the agreement of lease, and, leasing of the farm, in fact, was the unauthorized act of a government official, and Mrs. Herren was charged with notice of that limitation of authority.

12. In holding the principle of piercing the corporate veil, which assumes the *bona fide* entity of the agency, is applicable under the facts established. Ashley Homestead never in fact existed or functioned as an entity as the Trial Court correctly found.

13. In holding the whole record was bare of any evidence that there was a contract, express or implied, between Mrs. Herren, and, the United States.

14. In holding the sole relationship between Farm Security Administration and Ashley Homestead was that of debtor-creditor and its supervision did not go beyond its policy of protecting its loan and conducting an educational program.

15. By implying the suit of Mrs. Herren, filed on October 31, 1944, in the Ashley Chancery Court naming as defendants among others, Ashley Homestead Association, Inc., and the Farm Security Administration, and, praying for judgment in the amount of $2,500 for rental due for 1944 and $10,000 for the breach of the covenant of lease, has any bearing on the issues involved in the case at bar. There was a finding of fact that such State action was no bar to the proceedings since the United States in an independent action in the United States District Court for the Western District of Arkansas, El Dorado Division, (Civil No. 248) enjoined that action. The fact Mrs. Herren received her last year's rentals in the consent judgment rendered therein, does not estop her action here (R. 95-97).

16. In substituting legal conclusions from records of a routine administrative procedure obviously employed as an accounting system in the place of established facts disclosing that which actually occurred in the leasing and operation of Mrs. Herren's farm.

17. In holding Ashley Homestead Association, Inc., was a *bona fide* benevolent corporation and functioning as such.

18. In holding the Government was merely an optionee and Farm Security Administration (hence the United States) was not the lessee in fact.

19. In reversing the judgment of the District Court, sitting as a Court of Claims, in favor of Mrs. Herren.

REASONS FOR GRANTING THE WRIT

A. The decision below is contrary to, and in direct conflict with, *Herren* v. *Farm Security, et al.*, 153 Fed. 2d

76, declaring, "Such contracts as it was authorized to make were accordingly not obligations on its part entitively, but, if they were legal obligations, as the Statute and the executive order certainly must have intended them to be, they were and could only be in fact, obligations on the part of the United States using the name Farm Security Administration for administrative and identificatory convenience."

B. The decision below is in direct conflict with its own decisions in *Lee Hardware Company* v. *United States,* (8 CCA) 25 Fed. 2d 42, and, *United States* v. *Esnault-Pelterine,* 303 U. S. 26. In the latter case this Court said:

"We have said that, for the purposes of our review in such a case, the findings of the Court of Claims are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope. . . . The requirement that the Court of Claims should find the ultimate facts which are controlling places upon that court the duty of resolving conflicting inferences and to draw from the evidence the necessary conclusions of fact. . . . Even though the finding determines a mixed question of law and fact, the finding is conclusive unless the court is able to so separate the question as to see clearly what and where the mistake of law is."

It is submitted the findings of fact by the District Court limit the review to an application of such state of facts to the controlling principles of law, and, the District Court's findings cannot be disturbed unless such facts found are without warrant of law.

C. The decision is in conflict with *Ford* v. *Williams,* 62 U. S. 287; *Bostwick* v. *United States,* 94 U. S. 52, and *Keifer & Keifer* v. *Reconstruction Finance Co.,* 306 U. S. 381.

In *Ford* v. *Williams* the question was whether the undisclosed principal, for whose benefit a contract was made, could sue for the breach. This Court said:

"The contract of the agent is the contract of the principal, and he may sue or be sued thereon though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied

by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him." Obviously, under the facts here, the converse is true, and, the principal, the United States, (Farm Security Administration) may be held liable though its administrative device and agent, Ashley Homestead, was named as the lessee in the written lease.

In *United States* v. *Bostwick, supra,* this Court said:

> "The United States when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract followed by delivery of possession and occupation under it, is equivalent for the purpose of this action to a lease duly executed, containing all the stipulations agreed upon."

It is readily admitted no obligation against the United States arises from a contract implied by law. But such is not the case here. Under the facts found by the District Court, the United States through its agency, Farm Security Administration, pursuant to Executive Orders under the Acts of Congress, were duly authorized to lease, and, did lease, Mrs. Herren's farm, and, did actually farm it in discharging its program of rural rehabilitation. The United States had the use, occupancy and control, in fact, and with legal right, and, to the contrary notwithstanding Farm Security Administration employed as an administrative procedure for accounting purposes as a subterfuge or device it had created and called Ashley Homestead.

So, if there is rejected, the written lease, because the name of the principal, Farm Security Administration, did not appear as lessee, still, as the District Court has found, the actual lessee, Farm Security Administration (The United States), is liable for the damage flowing from waste committed as stated in *Bostwick* v. *United States,* "But the implied obligation as to the manner of use is as much obligatory upon the United States as it would be if it had been expressed." The last principle was aptly restated in *Keifer & Keifer* v. *R. F. C., supra.*

"But where the wrong really derives from an undertaking, to stand on the undertaking and to disregard the tort is not to invoke a fictive agreement. It merely recognizes a choice of procedural vindications open to the injured party."

D. It is difficult to state precisely the basis for the conclusions reached by the Court below in the light of its decision and direction on the first hearing of the case, *Herren* v. *Farm Security Administration, et al.*, 153 Fed. 2d 76. The opinion implies, if it does not definitely so state, the trial Judge, the Hon. John E. Miller, in deciding the facts, overlooked the various Executive orders, the hearings before the Select Committee of the House Committee on Agriculture to investigate the activities of the F. S. A., No. 88829, Government Printing Office, March 18, 1943, and Administrative Order No. 40, which is Defendant's Exhibit No. 12 (R. 156, 184). May it be noted said Executive order (R. 161) requires the borrowing agencies must be *bona fide*. The Trial Court made a specific finding on this issue which was urged throughout from the commencement to the end of the trial (R. 115, 156, 289, 291, 294, 369-372). In addition this Court will take judicial knowledge of the fact the learned trial jurist, the Hon. John E. Miller, was a member of the House of Representatives of the United States from March 4, 1931, to November 15, 1937, and a member of the United States Senate from November 15, 1937, to April 1, 1941. (See Congressional Directory for those years). Throughout the trial and hearings on preliminary motion of the United States, the Court considered carefully said Administrative order No. 40 and the reports of the hearings before the Select Committee of the House Committee of Agriculture investigating the activities of F. S. A. Not only this, but the Court below was furnished copies of and had knowledge of said hearings House Resolution 119, 78 Congress, First Session (1944). See footnotes 2 and 3, opinion, *Herren* v. *Farm Security Administration*, 153 Fed. 2d 76. For the convenience of this Court there is an excerpt from a letter written March 5, 1942, by the Comptroller General of the United States to the Secretary of Agriculture, taken from the report of the said hearings as Appendix II to this petition.

Correctly, the Comptroller General reviewed the procedure adopted by F. S. A. in administering the relief program through the medium of non-profit corporations. (See Appendix II). The Trial Court found the Ashley Homestead Association, Inc., as the evidence established, was merely a device under which the Farm Security was operating and in fact it was just a subterfuge employed to operate this land and to square themselves under the law. . . . That the Government can't deal and, in fact, do what they did here under the device of doing it under some other system (R. 86). "I don't think there is any doubt at all, and I find as a matter of fact, that the Ashley Homestead Association, Inc. was in truth and in fact the Farm Security Administration; that it was merely acting in whatever it did as an agent of the Farm Security Administration —it was a child of the F. S. A. It was brought into being by the Farm Security Administration officials and was under the complete control and domination of the F. S. A. I say that without any attempt to criticise the F. S. A. for I think the officials were acting in good faith. I think they are zealous in one thing, to extend the operation of their program, and I think they were in a quandary as to whether they had a right to extend their power to that extent and that they used the Ashley Homestead Association, Inc. as a means and as a device to extend their operations. Now, that is, so far as the Court is concerned, the first finding of fact. I could go ahead and ennumerate my reason for finding those facts and probably when the formal findings of fact are filed, I may elaborate some upon that" (R. 365).

There was no question but the District Court was correct in its findings. Obviously, the Court below overlooked and ignored these findings of fact and adopted the theory of the Government which reflects the explanation of Farm Security Administration officials before a select committee of Congress investigating F. S. A. affairs. A substantial portion of the statement of the case in the opinion of the Court below, if not *verbatim*, at least by paraphrasing, is the justification submitted to the Congress by Farm Security Administration. Compare opinion with page 1001, of said hearings before the select committee, for an example.

Essentially, it is submitted the lower court ignored the findings of fact by the District Court as to the actual *modus*

operandi in discharging its governmental functions with respect to the use of the Herren farm. The Government admits the Secretary of Agriculture, directing F. S. A. had the power to lease the land.

E. The Court below misapplied *United States* v. *Sherwood*, 312 U. S. 583; *Minn.* v. *United States*, 305 U. S. 382; *United States* v. *Minn. Investment Co.*, 271 U. S. 212; *Goodyear Co.* v. *United States*, 276 U. S. 287; *Sutton* v. *United States*, 256 U. S. 575; *Merritt* v. *United States*, 267 U. S. 338; *United States* v. *Algoma Lumber Co.*, 305 U. S. 415; *Baltimore & Ohio* v. *United States*, 261 U. S. 592. The Court below stated there was nothing in the record to support the finding there was a meeting of minds between Farm Security or the United States and Mrs. Herren that the United States would pay what Ashley agreed to pay. The facts and the acts of Congress upon which the decisions above were based are entirely dissimilar to that which was established as a fact in this case. The District Court found there was a meeting of minds within the well known concept of contract law. The law has assured that an alleged joker is estopped to claim a mere frolic or banter when the opposite party has reasonably acted in earnest. *Erwin* v. *Erwin*, 25 Ala. 236.

The precise question always is whether the common intention must be one actually existing in the minds of the parties or one which the law takes as existing because there is outward evidence of its existence and because it would be impossible to prove the contrary. Williston, Contracts, Sec. 20, takes the position that it is the expression of the mutual assent and not the mental assent itself which is the vital element in the contract.

Professor Costigan in 33 Harvard L. Rev. 376, has accepted the theory that mutual assent is ascertained by the application of an objective rather than a subjective test. Anson insists that the law does require the wills of the parties to be at one, but he admits that when men present all the phenomena of agreement, they are not allowed to say they were not agreed. Anson, Contracts, Turck Edition, page 3.

F. Finally, the lower Court was wrong in attempting to apply the principle of piercing the corporate veil to the

facts established in this case. As that doctrine is explained in *Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & C. Association,* 247 U. S. 490, it is not an insuperable obstacle to the imposition of liability on the United States under the evidence established in the case at bar.

The reversal of the judgment of the District Court, based upon an abundance of facts from which his findings were made is contrary to the recognized principle announced in the Goldclause case, *Perry* v. *United States,* 294 U. S. 330, "When the United States, with constitutional authority makes contracts it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. . . . The fact that the United States may not be sued without its consent is a matter of procedure. . . ." In *Lynch* v. *United States,* 292 U. S. 571, it was said:

> "The rights against the United States arising out of contract with it are protected by the Fifth Amendment. . . . When the United States enters into contract relations, its rights and duties are governed generally by the law applicable to contracts between private individuals."

THIS IS A CASE OF FIRST IMPRESSION AND IS OF MAJOR IMPORTANCE

A. This is a case of first impression and involves an administrative procedure conceived and employed by an Executive branch of the government in discharging a governmental function pursuant to an Act of Congress and Executive Orders. It does not include "the sue and to be sued" clause which this Court has definitely settled. Within the Fifth Amendment, private property shall not be taken for public use without just compensation. In the facts established by the evidence and found by the Trial Court, sitting as a Court of Claims, petitioner's property was taken, used and damaged by a major Executive branch of the government which would avoid liability for its legally authorized action through an abortive administrative procedure. A review of this case will establish the administrative bounds within which future governmental action for social and economic relief should be restricted.

B. This is a case where the defense arises under a Regulation of an Executive Department.

C. It involves the manner and method of discharging a governmental function for public relief and in defining the jurisdiction of a District Court, sitting as a Court of Claims, under the Tucker Act.

D. Because an important question of Federal Law is called for settlement in view of the conflicting and contradictory decisions of the Eighth Circuit Court of Appeals. *Herren* v. *Farm Security, et al.*, 153 Fed. 2d 76, and *United States* v. *Herren*, (R. 378-400).

E. If a major Executive Department of the Government, discharging a governmental function, under the law, touching the lives of millions of citizens and involving the property rights of many other citizens, can employ an evasive administrative device, which an eminent and well informed District Judge has found was not a *bona fide* entity, and thereby insulate the United States from the legal consequences of its lawful undertaking, an innocent victim is justified in asking the highest tribunal of his country to review the record and answer the question finally whether the citizen or his government is wrong.

It is submitted the Appellate Court was in error in reversing and dismissing the findings and judgment of the District Court and the questions to be answered are of major public importance to define and declare private rights against the United States in this changing era of social, economic and political concepts in our republican form of government.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of *certiorari* should be granted.

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Attorney for Petitioner.

March, 1948.

APPENDIX I.

NARRATIVE OF CREATION AND FUNCTIONS OF FARM SECURITY ADMINISTRATION

This compilation of the origin and functions of Farm Security Administration is copied from footnotes in the opinion of January 12, 1948, by the Eighth Circuit Court of Appeals in *Farm Security Administration, et al.* v. *Gordie M. Herren.*

Congress in the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and following Emergency Relief Appropriation Acts authorized the President of the United States to make loans to low-income farmers in stricken agricultural areas (Sec. 1); to acquire by purchase or by eminent domain any real property or any interest therein (Sec. 5); to establish the necessary agencies for the performance of these functions (Sec. 4); and to prescribe rules and regulations for their operation (Sec. 6). The President issued over a period of time a number of Executive Orders creating and putting into operation the Resettlement Administration, to which he delegated this authority. See Executive Order 7027, dated April 30, 1935; Executive Order 7028, dated April 30, 1935; Executive Order 7041, dated May 15, 1935; Executive Order 7083, dated June 24, 1935; Executive Order 7143, dated August 19, 1935; Executive Order 7200, dated September 26, 1935; Executive Order 7347, dated April 15, 1936 (1 F. R. 207); Executive Order 7396, dated June 22, 1936 (1 F. R. 651); Executive Order 7530, dated December 31, 1936 (2 F. R. 7). Executive Order 7027 established the Resettlement Administration and authorized the Administrator thereof to "acquire, by purchase or by power of eminent domain, any real property or any interest therein and improve, develop, grant, sell, *lease* (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein." By Executive Order 7530, *supra,* the property, function, and duties of the Resettlement Administration were transferred to the Secretary of Agriculture and the Administrator of the Resettlement Administration was made subject and amenable to the Secretary of Agriculture. By Secretary's Memorandum 732, dated Septem-

ber 1, 1937, 2 F. R. 1800, the Resettlement Administration was changed to the Farm Security Administration.

Executive Order 7143, dated August 19, 1935, as amended by subsequent Executive Orders and codified in the Code of Federal Regulations, at Section 301.3, Title VI, Chapter III, provided:

(a) Loans may be made by the Farm Security Administration (1) for the purpose of financing, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers, and (2) for such other purposes as may be necessary in the administration of approved projects involving rural rehabilitation or relief in stricken agricultural areas.

(b) Loans for the purposes mentioned in paragraph (a) (2) may be made by the Farm Security Administration either to individuals or to such *bona fide* agencies or cooperative associations as the Administrator shall approve: Provided, however, that such loans shall be made to such agencies or associations only upon condition (1) that they impose no inequitable restrictions upon membership or participation therein, and (2) that they be so conducted under the supervision of the Farm Security Administration as to protect adequately the interests of the members or participants therein.

By the Farmers' Home Administration Act of 1946, approved August 14, 1946 (Public Law 731, 79th Cong. (Chap. 964, 2d Sess.), the Farm Security Administration, its functions, powers, and duties were abolished. The Farmers Home Corporation, established by the Bankhead-Jones Farm Tenant Act of 1937 (50 Stat. 522, 527), to be subject to the Secretary of Agriculture, and to perform his duties under the Act, was charged with the liquidation of the functions of the Farm Security Administration.

APPENDIX II.

Excerpt of letter dated March 5, 1942, from Comptroller General of the United States to the Secretary of Agriculture and found on page 1147 of Part 3, Government Printing Office Pamphlet 88829, Hearings:

"The procedure adopted by the Farm Security Administration apparently has been to direct the organization by its employees of nonstock, nonprofit corporations in the State in which it is desired to acquire land—such employees serving as officers and directors of the corporations—and to loan to such corporations from rural rehabilitation funds amounts sufficient to purchase the land. It is evident that the corporations are not in any sense farmers' cooperatives. In fact at the time the loan is made to the corporation, it has not yet been determined who shall ultimately purchase and occupy the land to be acquired by the corporation. If the corporations are to be considered as private corporations, then the policy of the Congress with regard to loans to such corporations is evidenced in section 46 of the Bankhead-Jones Farm Tenant Act, *supra*, as follows:

"Nothing in this Act shall be construed to authorize the making of any loan, or the sale or other disposition of real property or any interest therein, to any private corporation, for farming purposes."

However the fact that these corporations were organized by employees of the Department who serve as officers and directors thereof and that they were organized at the direction of the Department in order to carry out a declared policy of the Department, to render financial assistance to this class of farm families with funds appropriated for the use of the Department, support the view that such corporations are under the control of the Department of Agriculture. Furthermore, it is inconceivable that the Department would undertake to provide for the creation of such corporations without taking steps to insure the conduct of the affairs of those corporations in line with the purposes which the Department had in view. Such control is a criterion by which private and public corporations are distinguished. (See *Maiatico Construction Company* v. *United States*, 79 F. (2d) 418, *certiorari* denied; 296 U. S. 649.)

While title IV of the Bankhead-Jones Tenant Act did provide for the establishment of a Farmers' Home Corporation to carry out such functions as the Secretary of Agriculture might delegate to the corporation from those powers and duties conferred upon him by titles I, II, and IV of the

act, there is no indication that the various defense relocation corporations organized by employees of the Department were created under that authority or bear any relation to the Farmers' Home Corporation.

It is not asserted that the Farm Security Administration has either express or implied statutory authority to organize or create corporations to carry on any of its functions, such as has existed with respect to the many other Government corporations which have been created from time to time. In this connection it may be observed that an important concomitant of the corporate form of carrying on governmental activities—that is, liability to suit in the courts—has been construed as dependent upon legislative consent, either express or implied. See *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 375; *Federal Housing Administration* v. *Burr*, 309 U. S. 242; annotation, 83 L. Ed. 794. Compare *North Dakota-Montana Wheat Growers' Association* v. *United States*, 66 F. (2d) 573, *certiorari* denied 291 U. S. 742. No indication is found in those decisions that such a corporation may be created by administrative officers of the Government without color of legislative authority. On the contrary, it would seem inherent from the conclusions expressed therein that the legislative intent to create or authorize the creation of a corporation must first be found to exist before the legislative intent with regard to immunity to suit may be determined (See *North Dakota-Montana Wheat Growers' Association* v. *United States, supra.*)

But the matter may be considered more simply as a question whether officers or employees of the Government may act, without authority of law, to create corporations under State laws to conduct the business of the United States. I regard it as well settled that such officers and employees have no authority to act in behalf of the Government except such as is duly conferred upon them (Floyd's Acceptances, 7 Wall. 666; *Whiteside* v. *United States*, 93 U. S. 247). See, also, 39 Op. Atty. Gen. 373, 376.

APPENDIX III.

POPE'S DIGEST OF THE STATUTES OF ARKANSAS BENEVOLENT ASSOCIATIONS

Section 2252. *How incorporated.* Any lodge of Freemasons or Odd Fellows, divisions of Sons of Temperance, or any grange of the Patrons of Husbandry, or any cooperative or other association organized for benevolent purposes, or for the mutual benefit of its members, or for the promotion of any other good and useful object, or any library company, school, college, medical, mechanical, agricultural or other association organized for the promotion of literature, education, science or art, or any association organized for the promotion of bodily or mental health, and all societies organized to promote either or all of the above named objects, and for all other similar purposes by whatever name they may be known, consisting of not less than three persons, and also any association of merchants and others in any incorporated city organized not for pecuniary profit, but as a board of trade or chamber of commerce, or of any special branch thereof in such city, consisting of not less than nine persons, may be constituted and declared a body politic and corporate, with all the privileges and powers and subject to all the liabilities contained in this act. Acts February 3, 1875, Section 1, p. 131. See Footnote 1.

Section 2253. *Where articles filed.* Any association of persons desirous of becoming incorporated, under the provisions of this act, shall file with the clerk of the circuit court and recorder for the proper county a copy of their constitution or articles of association and list of all the members, together with a petition to said court for a certificate of incorporation under the provisions of this act, *Id.*, Section 2.

Section 2254. *Certificates of incorporation.* Said clerk shall enter of record said constitution or articles of association and accompanying petition and list of names, and shall issue to said association, under the seal of said court, a certificate in the following form, to-wit: "Whereas A, B, C, D, E, F, and others, have filed in the office of the clerk of the.....court of.....county, their

Footnote [1]—Approval of the court is required to incorporate under this statute. *Watts* v. *Commercial Ptg. Co.*, 177 Ark. 525, 7 S. W. 2d 24.

constitution or articles of association in compliance with the provisions of the law, with their petition for incorporation, under the name or style of....., they are therefore hereby declared a body politic and corporate, by the name and style aforesaid, with all the powers, privileges and immunities granted in the law thereunto appertaining.

(Seal)

"Attest:....., clerk of the circuit court of the said.....county and *ex-officio* recorder." *Id.*, Section 3.

Section 2255. *Amendment to constitution.* All associations incorporated under the provisions of this act shall file a copy of all amendments to their constitution or articles of association, certified as such, with the clerk of said court, within sixty days after their passage. *Id.*, Section 4.

Section 2256. *First meeting.* The first meeting of any such corporation shall be called, organized and held in the manner prescribed in the constitution or articles of association of said corporation. *Id.*, Section 5.

Section 2257. *Powers and management.* Any such corporation shall have power to borrow or raise money necessary or convenient to the accomplishment of the purposes of the association or corporation and, from time to time, without limitation upon amount, draw, make, accept, endorse, execute, and issue promissory notes, drafts, bills of exchange warrants, bonds, debentures, and other negotiable and non-negotiable instruments and evidences of indebtedness and to secure the payment of any thereof and the interest thereon by mortgage, pledge, conveyance or assignment in trust of the whole or any part of the property of the association or corporation whether at the time owned or thereafter acquired; to sell, pledge, or otherwise dispose of bonds or other obligations of the association or corporation for its corporate purposes; to cooperate with any government agency or agencies whether national, state, county or municipal or with any business or private agency whatsoever in carrying out the purposes herein contemplated; to acquire by gift or in any other manner and to sell, lease, mortgage, pledge, assign, transfer or otherwise dispose of lands or real property, or any right or title there-

in or improvements thereon, personal property of every class and description for any purpose or use necessary, convenient, useful or incidental to the accomplishment of the purposes of the corporation. The form of government or management of such association or corporation shall be such as is prescribed by its constitution or articles of association. Such corporation and association shall have the capacity of suing and being sued and is authorized to do any and all things necessary, convenient, useful or incidental to the attainment of its purposes as fully and to the same extent as natural persons lawfully might or could do, as principals, agents, contractors, trustees or otherwise.

Section 2258. *Record of proceedings.* It shall be the duty of the clerk or secretary of any such corporation to keep a fair record of the proceedings of such corporation in a book provided for that purpose, and which shall be at all times open to the inspection of the members of such corporation. *Id.*, Section 8.

Section 2259. *Fees of clerks.* The clerk of the circuit court shall receive for his services under the provisions of this act such fees as are allowed by law for similar services. *Id.*, Section 9.

Section 2260. *Fair associations.* Agricultural and mechanical fair associations, and other associations of a public nature and design to promote the public good, may be constituted bodies politic and corporate in the manner now provided by law for "corporations for manufacturing and other lawful business," and the capital stock may be divided and held in shares of two dollars each. No profits or dividends shall ever be declared or paid under this act; provided, dividends may be paid to the amount of money paid in by the stockholders on their respective shares. Act December 14, 1875, P. 152, Sections 1, 2.

Section 2261. *Incorpordtion under other laws.* This act shall not be construed to prohibit such associations from being chartered and incorporated with the powers and privileges and in the manner now provided by law. *Id.*, Section 3.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 662

GORDIE M. HERREN, PETITIONER

v.

FARM SECURITY ADMINISTRATION, DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court of the United States for the Western District of Arkansas are printed at R. 39-46. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is printed at R. 379-400.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on January 12,

1948 (R. 400-401). The petition for a writ of certiorari was filed on March 8, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner and another, as lessors, entered into an agreement leasing petitioner's farm to an incorporated cooperative association, as lessee, and giving that association and the United States options to purchase the land. In order to assure effective prosecution of the rural rehabilitation program in connection with which the association was organized and the agreement executed, and in order to protect its interests as creditor of the association and its sublessee members, the United States participated to some extent in their affairs. The question presented is whether the record supports the conclusion of the district court that the association was merely an agent of the Government and the Farm Security Administration the true lessee under the agreement, and whether, therefore, the United States is liable, in a suit under the Tucker Act, for breach of the covenant in the lease against waste.

STATEMENT

This suit was brought, under Section 24(20) of the Judicial Code (28 U.S.C. 41(20)), to recover damages from the United States for waste allegedly committed in violation of an agreement (R. 11-25) under which petitioner and the Southwest Joi: t Land Bank, as lessor, leased petitioner's farm to Ashley Homestead Association, Inc. ("Ashley"), as lessee, and gave Ashley and the United States options to purchase the land. The theory of the complaint is that Ashley was an agent and "device" of the Farm

Security Administration ("Farm Security");[1] that, in truth, Farm Security was the lessee; and that the United States was, therefore, liable in damages for breach of the lease agreement (R. 5-9).

The agreement in question was executed in connection with the rural rehabilitation program which had been undertaken by the Government pursuant to the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (R. 185-186, 305-306). Pursuant to that Act, the President was authorized to expend monies for rural rehabilitation and relief in stricken agricultural areas, and, as part of that program, to finance the purchase of farm lands and necessary equipment by farmers (49 Stat. 115, 117). By executive order, these powers were delegated to Farm Security, and loans authorized to be made either to individuals or to *bona fide* cooperative associations (6 C.F.R. 301.1 *et seq.*).[2] In addition to financial aid, the program also con-

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[1] By the Farmers' Home Administration Act of 1946 (60 Stat. 1062), the Farm Security Administration, its functions, powers, and duties were abolished. The Farmers' Home Corporation established by the Bankhead-Jones Farm Tenant Act of 1937 (50 Stat. 522, 527) to be subject to the supervision of the Secretary of Agriculture and to perform his duties under that Act, was charged with the liquidation of Farm Security's functions.

[2] In the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (and the following Emergency Relief Appropriation Acts), Congress authorized the President to make loans to low-income farmers in stricken agricultural areas (Sec. 1); to acquire by purchase or by eminent domain any real property or any interest therein (Sec. 5); to establish the necessary agencies for the performance of these functions (Sec. 4); and to prescribe rules and regulations for their operation (Sec. 6). The President issued a number of executive orders creating and putting into operation the administrative agencies to which he delegated this authority. See Executive Order 7027, dated April 30, 1935; Executive Order 7028, dated April 30, 1935; Executive Order 7041, dated May 15, 1935; Executive Order 7083, dated June 24, 1935; Executive Order 7143, dated August 19, 1935; Executive Order 7200, dated September 26, 1935; Executive Order 7347, dated April 15, 1936 (1 F. R. 207); Executive Order 7396, dated June 22, 1936 (1 F. R. 651); Executive Order 7530, dated December

templated assistance in and supervision of the actual farming operations, so that the most modern agricultural methods might also be brought to the rehabilitation of the low-income farmer. See Hearings before the Select Committee of the House Committee on Agriculture to Investigate the Activities of the Farm Security Administration, 78th Cong., 1st sess., pursuant to H. Res. 119, pp. 982-984.

The Government's program provided for the leasing of small farms by individual farmers, to whom rehabilitation loans would be made, but in certain areas where landowners were reluctant to break up their large holdings into small units, the so-called land leasing program was found to be necessary (R. 185, 306). Under that program, Farm Security would help the individual farmers organize themselves into a cooperative association, which could then lease a large tract and subdivide it into individual family-type farms for subleasing to their members. Farm Security would help draft the documents for organization of the association and the lease agreement between the landowner and the association, would loan the money to the association to enable it to pay a year's rent in advance, and would aid in the subleasing arrangements. It would then, in turn, help the member sublessees by preparing individual farm plans and supervising their execution, and, where necessary, by making regular rehabilitation loans. Farm Security would continue thus to participate in the affairs of

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31, 1936 (2 F. R. 7). Executive Order 7027 established the Resettlement Administration and authorized the Administrator thereof to "acquire, by purchase or by the power of eminent domain, any real property or any interest therein and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein." Executive Order 7530 transferred the property, functions, and duties of the Resettlement Administration to the Secretary of Agriculture and made the Administrator of the Resettlement Administration subject and amenable to the Secretary of Agriculture. By Secretary's Memorandum 732, dated September 1, 1937 (2 F. R. 1800), the Resettlement Administration was changed to the Farm Security Administration.

the association and its members at least until the loans had been repaid.[3] In all, Farm Security aided in forming 52 land leasing associations, composed of 2,000 small farmers, leasing 136,386 acres of farm land (R. 300, 305-306, 309-310, 311-313, 317; also, see, Hearings on the Activities of Farm Security, *supra*, pp. 1001-1002; *Herren* v. *Farm Security Administration, etc.*, 153 F. 2d 76, 79, fn. 3).

Ashley, the lessee in this suit, was such a land-leasing cooperative association. It was incorporated on January 20, 1939, as a benevolent corporation, under Sections 2252-2261 of the Statutes of Arkansas (Pope's Digest, 1937 (R. 6, 194, 199). Its incorporators were farmers, and although for a time three Farm Security employees served on its Board of Directors, participating at meetings as advisors or consultants in order to assist the association in conducting its affairs from an educational standpoint and also to protect the interests of the Government, only one such director remained by 1943, and, thereafter, the practice of having a Farm Security employee on the Board was entirely discontinued (R. 300-301, 306-307). Two loans were made to Ashley by Farm Security, one on February 4, 1939, in connection with a lease of certain property known as the Wells property (R. 239-247), the other on May 7, 1940, in connection with the lease of the Herren property (R. 247-255).[4] These loans were made, in accordance with the

[3] Since meetings of Ashley were called at the direction of the Farm Security supervisor (R. 132), notices were sent out from his office (R. 150); he was in charge of the meetings, kept the minutes, typed them out and brought them around for Ashley's officers to sign (R. 131); and where personal loans were made to the members, each executed notes and a chattel mortgage on all his personal property to the Government (R. 122, 151-152); it is understandable why some, though they had entered into leases with Ashley (R. 121-122, 134, 152), were under the impression that they were renting their farms from and working them for Farm Security (R. 151) and that the Farm Security supervisor "managed" the properties (R. 131-133).

[4] This latter, the lease here in question, was executed on or about January 1, 1940 (R. 11). Petitioner testified that she dealt only with Farm

established administrative procedures, only after Ashley had submitted applications accompanied by numerous exhibits to show that it was a *bona fide* cooperative association (R. 189-226); an economic justification for the loan had been prepared (R. 264-266); the loan had been approved by the Administrator of Farm Security and the Secretary of Agriculture (R. 266); and authority had been given to the regional director of Farm Security to execute the loan agreement on behalf of the Secretary of Agriculture (R. 261). Appropriate loan agreements between the United States and Ashley were then executed (R. 239-257), mortgage notes in favor of the United States signed by Ashley (R. 257-260), and a chattel mortgage to teh United States executed and filed (R. 267-272).

On October 31, 1944, petitioner filed a petition in the Ashley County Chancery Court of the State of Arkansas, naming as defendants, among others, Ashley and Farm Security and praying for judgment in the amount of $2,500 for rental due for the year 1944 and $10,000 for breach of the covenant of the lease against waste (R. 334-343). An injunction to enjoin prosecution of the action against Farm Security was, however, sought and procured in the United States District Court for the Western District of Arkansas, Eldorado Division (Civil No. 248). Petitioner, nevertheless, continued the action against Ashley, and the Chancery Court held her entitled to recover $2,500 as rentals for 1944

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* Security employees and saw the signatures of Ashley's representatives only after execution when a copy of the agreement was sent to her; she didn't know then why the signatures were there (R. 79-82, 84). Nevertheless, all rental checks received and endorsed by petitioner, though countersigned by Farm Security representatives, were signed by Ashley's officers (R. 88-93). And petitioner's college-educated son, who represented her in all the negotiations culminating in the lease, carefully studied a model lease agreement where the lessee was an association, before his mother executed the present agreement, and signed a letter on her behalf stating her "understanding that this is to be a five-year lease between Ashley County Homestead Association and me" (R. 98, 105-107, 109-110).

and simultaneously ordered the liquidation of Ashley, pursuant to the prayer of another petition pending before it (R. 329-333). On May 15, 1945, noting that petitioner and her attorney had been "fully paid, and there is on hand in the register of this court for distribution • • • the total sum of $3,403.76," the court ordered the distribution of that money to the Ashley members (R. 360-362).

On February 13, 1945, petitioner instituted the present action, praying judgment for damages in the amount of $10,000 against respondent for waste in violation of the lease covenant (R. 5-9). On respondent's motion to dismiss and for summary judgment (R. 28), the district Court ordered dismissal of the complaint, holding that the United States was not suable on contracts of the Farm Security Administration (R. 29; *Herren* v. *Farm Security Administration, etc.*, 60 F. Supp. 694). On appeal to the court below, that court, reserving decision on the question whether the Farm Security Administration contracted against waste in the instant case, held that the United States was suable on such contracts and that an action for breach of a covenant against waste sounds in contract and not in tort. Accordingly, the judgment of the district court was reversed, and the cause remanded for further proceedings (R. 31-32; *Herren* v. *Farm Security Administration, etc.*, 153 F. 2d 76).

A hearing on the merits was thereafter had on June 26-27, 1946, before the district court sitting without a jury, and testimony and documentary evidence were received on behalf of petitioner and respondent (R. 47-364). At the close of the trial, the court stated that in its opinion Ashley was acting as an agent of Farm Security and was under the complete control and domination of Farm Security (R. 364-369), and on October 14, 1946, the court entered its findings of fact and conclusions of law, reiterating that statement and, in addition, concluding that the Secretary of Agricul-

ture had the power to lease land here involved through the device of a corporate agent; that that power was delegable; that it had indeed been delegated to the regional director of Farm Security who had signed the agreement on behalf of the Government; and that by virtue of these facts the United States had become liable for the performance of the lease according to its terms (R. 41-45). Accordingly, since the court found that the covenant against waste had been breached, it assessed damages against the United States in the amount of $9,500, with interest and costs (R. 46). The Government's motion for amendment of the findings of fact and for additional findings was overruled on October 28, 1946 (R. 369-372).

On appeal to the court below, the judgment of the trial court was reversed, with directions to dismiss the complaint (R. 400-401).

ARGUMENT

The court below concluded that there was no evidence in the record to support the district court's conclusion that the Government had bound itself by contract to pay damages for waste to petitioner's leased farm and no rational basis for inferring such a contract (R. 391, 400). In the absence of such a contract, the district court had no jurisdiction and should have dismissed the suit. *United States* v. *Sherwood*, 312 U. S. 584, 586; *Minnesota* v. *United States*, 305 U. S. 382, 387-388; *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217. The holding of the court below is so clearly correct that further review by this Court is not warranted.

1. In accordance with the theory of petitioner's complaint, the district court held that Ashley, though an independent corporation, duly organized under the laws of Arkansas, was in reality "a device created by * * * Farm Security * * * for its convenience in making the

lease and in carrying out operations * * * simply a contractual designation through which * * * Farm Security * * * took possession of the land, and controlled and operated the farm during the term of the lease. * * * " (R. 44). But, as the court below remarked (R. 382-391), all the transactions here, when viewed in the perspective of the entire rural rehabilitation program, of which they were a part, are quite consistent with a debtor-creditor relationship. The supervision and control which Farm Security exercised over Ashley and its member sublessees were not those of a principal with respect to his agent. The Government was acting rather as a creditor and the proponent of the national rural rehabilitation program. Farm Security participated in the affairs of Ashley and its sublessees because it was essential that Ashley function properly and that its members fare well; only in that way would Ashley effectively render the service for which it had been created, and would the association and the individual farmers repay the loans which Farm Security had made to them.

Thus, the requirements that Ashley deposit its funds in a bank approved by Farm Security, that it not withdraw them without the countersignature of a Government designee, that it file reports, limit its membership, and keep books available for Government inspection, were all conditions of the loan agreement deemed necessary "for the protection of the Government's interests" (R. 288). The loan agreement did provide, further, that if Ashley failed to live up to the terms of the agreement, the Government could take over and actively manage the corporation (R. 252), but that contingency did not occur. Moreover, supervision and guidance in the conduct of Ashley's affairs by Farm Security employees was necessary in view of the lack of familiarity of Ashley's members with the forms and procedures relating to corporate management; and the only

reason for having Farm Security employees on the association's board of directors was "the fact that the Association gave a loan agreement to the government which was for the protection of the government's interest, and realizing that these farmers were not versed in carrying on the affairs of the assoc tion, it was fully justified under the loan agreement, until they could have some training in carrying on their own affairs" (R. 287-288).

In short, Farm Security's participation in Ashley's affairs and in those of its members was no greater than that often indulged in by creditors in the business of their debtors, and it does not justify the imposing of Ashley's liabilities on the Government. Even where the relationships between creditor and debtor have been closer and more direct, the courts have refused to impute liability to the creditors for the obligation of the debtors. *Chicago Mill & Lumber Co. v. Boatmen's Bank,* 234 Fed. 41 (C.C.A. 8); *Owl Fumigating Corp.* v. *California Cyanide Co.,* 30 F. 2d 812 (C.C.A. 3).[5]

2. Furthermore, as the court below held, "it is clear from the face of the lease that the United States did not intend to bind itself thereon as the lessee, but was interested only in securing an option to purchase the property, and to

[5] Land-leasing corporations such as Ashley are not to be confused with the defense relocation corporations, which employees of the Farm Security Administration were authorized to create. See Hearings on the Activities of Farm Security, *supra,* pp. 1138-1153; cf. Section 3, Farmers' Home Administration Act of 1946 (60 Stat. 1062). It was in regard to the Secretary of Agriculture's power to authorize his employees to create defense relocation corporations that the disagreement between the Comptroller General and the Attorney General, to which petitioner alludes, occurred. See Pet. 16, 21-23; Hearings, *supra,* pp. 1140-48, 1150. So far as land-leasing associations are concerned, such as that here involved, the power of employees to create such organizations is irrelevant; the Secretary of Agriculture at no time authorized their creation by government employees, and the record here is bare of any indication that such authorization was given or that any such corporation was created by federal employees.

assure that Mrs. Herren had a proper title to the property" (R. 394). The lease mentions the United States in only a few places. In enumerating the parties, petitioner and the Southwest Joint Stock Land Bank of Little Rock, Arkansas, are expressly designated "the 'Lessors'," and Ashley "the 'Lessee';" the United States, acting by and through the Secretary of Agriculture, is merely referred to as "the 'Government' " (R. 11). Paragraph 5(a) provides that "the Government, or the Lessee, * * * shall have an exclusive and irrevocable option, at any time prior to December 31, 1941, to purchase said property upon the following terms and conditions * * *" (R. 12), whereas paragraph 5(b) vests in the United States, in case it exercises the option, "the right to terminate this lease as of the end of any calendar year by giving written notice of such termination to the Lessee at least Ninety (90) days before the end of such year * * *" (R. 14). Further mention of the United States appears in paragraph 10(a), which permits the "Lessee" to sublet all the property to any tenant "upon first receiving the written consent of the Government thereto" (R. 17), and paragraph 10(b) permits the "Lessee" to sublet any part of the property "without first receiving the consent of the Government" (R. 17). Paragraph 11(b) obligates the "Lessors" to furnish the Lessee "with evidence of title in it satisfactory to the Government" (R. 18), whereas paragraph 12 provides that "all rights, privileges, benefits, options and powers conferred herein on the Government may be exercised on its behalf by the Secretary of Agriculture, or by the head of any other agency of the Federal Government that may from time to time be vested with authority over the subject matter of this lease, or by the duly authorized representative of either of them" (R. 18).

If Ashley had been merely a contractual designation or an agent for the United States and the Government had in-

tended to assume the obligations of the lease, there would have been no purpose in distinguishing meticulously between the United States and Ashley. Nevertheless, each time the United States is mentioned in the lease, it is in order to give it rights which were separate and distinct from Ashley's. There would have been no purpose in reserving two separate options to purchase the property, one for the United States and one in favor of Ashley, nor in making Ashley's right to exercise its option dependent on the approval of the Government, if Ashley had been acting for the Government, since, in that event, a reservation of a single unconditioned option in favor of the lessee would have been sufficient. Nor would there have been any purpose in reserving the right to the United States, once it should have exercised its option, to terminate the lease on 90 days' notice, for if Ashley had been its contractual designation, *i.e.*, if the United States and Ashley had been one and the same, the purchase of the property by the United States would have merged the lease with the title. Furthermore, there would have been no need to condition the subletting of all the property upon the written consent of the United States, nor to permit the leasing of any part thereof without the consent of the United States.

Finally, it is clear from the face of the lease that the United States did not intend to bind itself as lessee, and since it is a well-established principle of contract law that those who are parties to a contract and are bound by it are to be ascertained by an inspection of the document, the provisions of which being controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded, it follows that petitioner's claim was properly rejected. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415; see, also, *Waterman Steamship Co.* v. *Land*, 151 F. 2d 292, 296 (App. D. C.), reversed on other grounds

sub nomine Macauley v. *Waterman Steamship Corp.*, 327 U. S. 540; *Anson on Contracts* (Corbin's 3rd Ed. 1919) § 275 *et seq.*; cf. *Hodgson* v. *Dexter*, 1 Cr. 345.

3. The court below adverted to one further consideration why the United States cannot be held liable under the covenant in the lease (R. 395-399). Neither the regional director of Farm Security, who signed the agreement for the Government, nor any other employee of the agency was authorized to enter into a lease of petitioner's farm for the United States, whether in its own name or in the name of Ashley. And, since persons dealing with an agent of the United States are charged with notice of the limitations on his authority and the United States is bound only by the acts of its agents which are within their authority (*Federal Crop Insurance Co.* v. *Merrill*, 332 U. S. 380; *Wilber National Bank* v. *United States*, 294 U. S. 120, 123; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *United States* v. *City & County of San Francisco*, 310 U. S. 16, 32; *United States* v. *North American Co.*, 253 U. S. 330), the question of Ashley's relationship to the Government becomes wholly irrelevant.

There is no support for the district court's holding that Ashley was in fact authorized to lease the land for the Government (R. 45). The telegraphic authorization (R. 396) from the Administrator of Farm Security to the regional director who signed the lease for the Government, to which the district court referred (R. 45), did not authorize him or anyone else to bind the United States as lessee, as the court below correctly held (R. 398). When considered side by side with the request for authorization to which it was the reply (R. 397), it is plain that it was intended solely to permit approval of the agreement as a basis for the loan of money to Ashley, and in no respect to permit obligating the United States as lessee.

4. Finally, in holding that Ashley was the "device" of, and a "contractual designation" and "corporate agent" for Farm Security and that Farm Security was the real lessee of the Herren property, the district court, in effect, disregarded the concededly separate corporate entity of Ashley. Whatever the propriety of piercing the corporate veil where the corporate entity has been used "to work fraud or injustice" (*Taylor* v. *Standard Gas Co.*, 306 U. S. 307, 322), such an equitable procedure cannot be used to impose Tucker Act liability on the United States. In the present case, there is no fraud.[6] Moreover, it should be noted that, in any event, the authorities are in agreement that all or a majority of the stock ownership of the subsidiary by the parent or a complete identity of stock ownership is a *sine qua non* of such piercing (Douglas and Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L. J., 193, 196); the United States, however, had no ownership of Ashley whatsoever, and when its assets were distributed upon its liquidation, it was not to the United States that the money went, but only to its farmer members (R. 360-362).

Moreover, piercing the corporate veil of Ashley would not support the finding of a contract with the United States. The principles governing the disregard of the corporate entity are broad equitable principles, and the existence *vel non* of a real contract is irrelevant, since the imposition of liability on the person reached by the piercing of the veil does not depend upon contract principles; indeed, if contract principles were applicable, there could in all probability be no piercing of the veil. See Douglas and Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L. J. 193, 210-211; *Weisser* v. *Mursam*

[6] As a matter of fact, petitioner's counsel expressly denied that her claim was based on any claim of fraud (R. 86).

Shoe Corp., 127 F. 2d 344 (C.C.A. 2); *Majestic Co.* v. *Orpheum Circuit*, 21 F. 2d 720 (C. C. A. 8); *Kingston Dry Dock Co.* v. *Lake Champlain Trans. Co.*, 31 F. 2d 265, 267 (C. C. A. 2); *Gillis* v. *Jenkins Petroleum Process Co.*, 84 F. 2d 74 (C. C. A. 9). Since piercing the corporate veil of Ashley to reach the United States would not support the finding of a contract, express or implied in fact, between petitioner and the United States, there is no basis on which to allow recovery against the United States under the Tucker Act. *Goodyear Co.* v. *United States*, 276 U. S. 287, 293; *Sutton* v. *United States*, 256 U. S. 575, 581; *Merritt* v. *United States*, 267 U. S. 338, 341; *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217; cf. *Public Water Supply Dist. No. 6* v. *United States*, 66 F. Supp. 66 (W. D. Mo.).

CONCLUSION

The judgment of the court below is clearly correct, and there is no conflict of decisions. Further review by this Court is not warranted, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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